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Private Rail Crossings: A Report on the Task Force to Study Issues Concerning Private Railroad Crossings Throughout the State As Required by 2013 Resolve Chapter 59

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PRIVATE RAIL CROSSINGS

*A report on the Task Force to study issues
concerning private railroad crossings throughout
the State as required by
2013 Resolve Chapter 59*

Presented to the
Joint Standing Committees on
Judiciary & Transportation
126th Legislature

*Prepared by MaineDOT
February 3, 2014*



MaineDOT

Background

In the early spring of 2012, Pan Am Railway offered new private rail crossing agreements to a small group of landowners in Belgrade and Oakland. These new agreements outlined significant increases in annual crossing fees (\$1500 +/-) and a requirement for landowners to have a \$10 million liability insurance policy covering themselves and the railroad.

A small group of the affected property owners reached out to Representative Keschl, who worked with then Speaker of the House Nutting, Senator Saviello, and the Maine Department of Transportation, to set up initial meetings with Pan Am to discuss the agreements and a possible solution. Through these meetings, Pan Am agreed that they would reduce their annual fee significantly (\$500 +/-) and drop the liability insurance requirement, if legislation would be enacted protecting the railroad from liability at these private crossings similar to the liability waiver that landowners have under the recreational liability statute (14 MRSA §159-A). Pan Am agreed to delay enforcing the new agreements until the liability issue could be addressed in statute during the First Regular Session of the 126th Legislature.

In response to those conversations, LD 154 was introduced by Rep. Keschl. It originally sought to make changes to the recreational liability statute. This concept was met with significant opposition. The final enacted version (Appendix A) was a Resolve directing MaineDOT to convene a task force of interested parties to study the issues concerning private railroad crossings, the liability surrounding them, and the fees charged by private companies, and report to the Joint Standing Committee on Judiciary by February 1, 2014.

In response to the Resolve, MaineDOT invited participation from owners of property accessible only by private railroad crossings; railroad companies operating in this State; owners of railroad tracks subject to private railroad crossings, including the State; the Small Woodlot Owners Association of Maine; the Maine Forest Products Council; the Office of the Attorney General; and the Maine Trial Lawyers Association to represent the interests of members of the public who could be affected by limitations of liability. A total of four meetings were held in the fall of 2013; this represents the final report of those meetings.

Issue: Liability, Fees, Process

In the simplest of terms, the issue at its core is a disagreement between private property owners and a private company. Pan Am believes they are well within their rights as a private landowner to regulate the use of their property. Many of these private agreements had not been updated in well over 30 years. Two dominant issues drove the task force's discussion – the increase in crossing fees, and the requirement to obtain liability insurance.

- Liability: Pan Am clearly stated from the beginning of the process that liability was an issue for them. They do not want to be liable for accidents that may occur at private crossings. In their view, either property owners must obtain liability insurance, or legislation will have to be enacted absolving the railroad of liability.
- Fees: Pan Am has stated before the Judiciary Committee during the deliberations on LD 154 and at each subsequent task force meeting that should an agreement be obtained absolving them of liability in Maine Statute, they would cap their crossing fees at 20% more than the State's fee. At this time, the state's fee is \$350 per year (MaineDOT's private rail crossing agreement – Appendix B) for individual crossings. Fees may be adjusted based on use, subdivisions, etc., similar to the manner in which MaineDOT's adjusts rates based on use. Pan Am has stated that the individual crossing agreements are documents negotiated between them and the property owners seeking the crossings. Language can change, or be modified to reflect individual situations.
- Process Concerns Regarding Owners Affected: From the onset of the process, the property owners involved expressed significant concerns regarding the manner in which Pan Am began the process to institute changes to the crossing fees and liability insurance. As an example, one private rail crossing may provide access to three properties, but only one property owner received the notice and requirement for an updated crossing agreement and liability insurance. Pan Am has expressed significant regret for the manner in which the process initially began and has been working in good faith to rectify the misstep. They have assured the task force that they will make every effort to pursue crossing agreements with all necessary property owners; it is also within their financial best interest to have as many signed agreements as possible. This issue is one that is easily identified, but not easily rectified. In the situation of one crossing providing access to three properties, should all three property owners be notified about the need for a private crossing agreement, when only two actually pay the fee and negotiate the crossing agreement? Should the third continue to cross even if they do not sign onto the agreement? The railroad would not remove the crossing with two agreements in place so the free ride granted to the third landowner is the issue.

Federal Regulation

Despite this being a dispute between a private company and a private property owner, there has been much desire for legislation to be enacted at the state level rectifying such situations. However, there is very little that is able to be enacted at the state level that would not be federally preempted.

The railroad industry has been federally regulated since 1887 with the adoption of the Interstate Commerce Act. Through the 1870s and 80s, state laws were enacted to prohibit certain acts by the railroad industry. In 1886, the US Supreme Court ruled in *Wabash, St. Louis & Pacific Railway Company v. Illinois* that state laws regulating interstate railroads were unconstitutional because they violated the Commerce Clause of

the Constitution, which gives Congress the exclusive power “to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.” The following year, the Interstate Commerce Act was enacted, and the Interstate Commerce Commission (ICC) was created. Following the abolishment of the ICC the Surface Transportation Board was given exclusive oversight of the railroads.

Other States

Other States were surveyed asking for any legislation or policy within their state that would provide insight to the task force. The states that replied to our request for information indicated that they consider private crossings an issue between the private parties. No other states could be found that have laws or requirements related to private crossings and private crossing agreements.

Proposal

In an effort to address the liability issue, Pan Am proposed the following solution. The requirement imposed by Pan Am for liability insurance would be removed. Statutory changes would be made (draft legislation as Appendix C) to recognize that for the property owners with crossing agreements (authorized users), the railroad would have no duty of care beyond what is required in the agreement. Authorized users would also be defined as visitors to the property of those with crossings agreements. Unauthorized users would be treated under the law as trespassers (they are trespassers today). Other land owners using the crossing without an agreement would be considered trespassers. Pan Am would be willing to help with the enforcement of the trespassing law by requiring the railroad police to cite them as trespassers, and they agreed to step up enforcement.

Should the property owners with crossing agreements wish to obtain liability insurance, they are welcome to do so, but Pan Am would not require it. Pan Am agreed, as they had previously, to cap the private residential crossing fee at the state’s crossing fee (currently \$350) plus 20%.

Property Owners

The property owners view that the railroad as presenting a “take it or leave it predicament” when it comes to a private railroad crossing agreements. Prior to spring 2012, most property owners had crossing agreements with the railroad that had not been updated in several years, and the crossings fees were small and generally no requirement to carry liability insurance.

The property owners agree that some of the private railroad crossing fees have not been updated sufficiently to fund proper maintenance of the crossing. They expressed that the

State of Maine's private crossing agreement and fee structure are appropriate for a private railroad crossing.

The landowners felt that Pan Am purposefully targeted a small number of landowners along Messalonskee Lake as a test to the acceptance of their proposed new fee structure and insurance requirement. The landowners believe that this was deliberately done to generate just enough response from the landowners so that a bill could be introduced to the state legislature and hopefully passed, while the majority of Maine landowners that could be affected by such a law would be all but unaware, and grant Pan Am the liability release at all private crossings that they sought. Pan Am has repeatedly denied this claim. They have consistently maintained that their plan is to update all of the existing private crossing agreements statewide and they simply began the process in the Belgrade region.

Liability insurance has been outlined as an issue for the landowners. It is difficult, in some cases impossible, to obtain the insurance to the level in which Pan Am was originally requesting.

The property owners have expressed concerns regarding the proposal put forth by Pan Am stating that it addresses the liability concerns of the railroad but does not address liability and cost concerns of landowners. They have expressed that they are not confident of Pan Am's willingness to cap crossing fees at 20% more than MaineDOT's should the liability issue be resolved.

The property owners would like Pan Am to voluntarily agree in writing to issue new private railroad crossing agreements that use MaineDOT's private crossing agreement language, MaineDOT's fee structure and MaineDOT's liability requirements. They further state that existing private crossing agreements would not need to change their language other than applying the State of Maine fee structure and the State of Maine liability requirements to existing agreements.

Railroad Owners

Pan Am was an active participant in the process and voluntarily put forth the proposal waiving liability. A representative from St. Lawrence and Atlantic Railway (SLA) also participated in the task force process. No other railroad operators were engaged in the task force. The draft proposal does not affect railroads other than Pan Am regarding liability insurance requirements, but SLA does not wish to see the proposed changes move forward. It is difficult to see how the legislation would apply to only one railroad. The other rail operators will need to become engaged if this proposed legislation moves forward.

Maine Trial Lawyers

The Maine Trial Lawyers oppose any attempt to solve a contractual dispute between Pan Am and a small number of landowners using Pan Am private crossings with legislation providing immunity and other relief to railroads. Their reasons for their opposition are numerous and outlined verbatim:

1. The proposal would only benefit Pan Am (and other Maine railroads, including the State) and would not provide any protection for the landowners other than a vague promise by Pan Am regarding what they would demand from landowners. The other railroads in Maine did not even participate in the work of the group yet they would benefit greatly by this legislation. [*St. Lawrence and Atlantic did participate in the task force process.*]
2. The scope of the solution far exceeds the problem presented to the Legislature. The problem presented was a private dispute between Pan Am and a small number of landowners regarding increased maintenance fees and insurance. Because of this, the working group consisted of a few of the affected Pan Am landowners, but did not include the participation of other landowners that Pan Am has not yet contacted about new contracts. Even more striking is that there was no participation by landowners serviced by other railroads, and it is unlikely these landowners are even aware that there is a working group that is addressing the problem.
3. In addition to immunity the proposed legislation would give the railroads unprecedented power over the landowners who use private crossings to get to their property. If a landowner did not have a signed agreement with a railroad they would be considered trespassers and could be denied access to their property by the railroads. [*They are considered trespassers now under Maine law*] This would give railroads an even greater leverage than they have now in negotiating with landowners.
4. Even if they have a signed agreement with the railroad, landowners and their guests would not be able to sue the railroad for negligently maintaining the crossing. The railroad would only be liable for a willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity.
5. Anyone who is not invited by an “authorized user” would be a trespasser. Thus if a landowner who has not signed an agreement with the railroad invites others to his home, they would be considered trespassers if they used the private crossing, even if they did not know the landowners status. This would include family, friends, utility deliveries, etc. [*They are considered trespassers now under Maine law*]

Conclusion

This remains a dispute between private property owners and a private company. There is no clear path forward. The proposed legislation would certainly address the issue of liability. With liability no longer an issue for Pan Am, they have agreed they would adjust their crossing agreements and charge a more modest fee. There does not appear to be consensus amongst the limited group of property owners involved in the task force that the proposed liability waiver is a path they wish to pursue – likewise with St. Lawrence and Atlantic Railway.

Pan Am has been a very willing participant in this process, has worked to rectify the early damage done by their initial attempt at revising the crossing agreements, and has remained at the table in good faith over these last two years. Any proposals related to liability language for statute that have come forward to help address the concerns raised by the property owners have come forth from Pan Am.

The group met and discussed this issue at four different meetings throughout the fall and while the discussion brought about a better understanding of some of the concerns surrounding private rail crossings from all parties, there was no consensus on the best way to move forward on this issue.

STATE OF MAINE

IN THE YEAR OF OUR LORD
TWO THOUSAND AND THIRTEEN

H.P. 129 - L.D. 154

**Resolve, Directing the Department of Transportation To Convene a Task
Force To Study Issues Concerning Private Railroad Crossings**

Sec. 1. Task force; study. Resolved: That the Department of Transportation shall convene a task force to study issues concerning private railroad crossings throughout the State. The study must include at a minimum questions about private railroad crossings concerning liability, maintenance fees, license fees and public safety. The department shall invite the participation of no more than 2 representatives of each of the following: owners of property accessible only by private railroad crossings; railroad companies operating in this State; owners of railroad tracks subject to private railroad crossings, including the State; the Small Woodlot Owners Association of Maine; the Maine Forest Products Council; the Office of the Attorney General; and the Maine Trial Lawyers Association to represent the interests of members of the public who could be affected by limitations of liability. The task force shall review activities in other states to address the same issues. The department shall keep the members of the Joint Standing Committee on Judiciary informed about scheduled meetings of the task force; and be it further

Sec. 2. Report; legislation. Resolved: That the task force shall report on the results of its study under section 1 to the Department of Transportation. The department shall report the task force's findings and recommendations to the Joint Standing Committee on Judiciary no later than February 1, 2014. The Joint Standing Committee on Judiciary may report out a bill to the Second Regular Session of the 126th Legislature upon receiving the report; and be it further

Sec. 3. Appropriations and allocations. Resolved: That the following appropriations and allocations are made.

TRANSPORTATION, DEPARTMENT OF**Multimodal - Freight 0350**

Initiative: Provides one-time funding to convene a task force to study issues related to private railroad crossings.

OTHER SPECIAL REVENUE FUNDS

All Other

2013-14

\$25,000

2014-15

\$0

OTHER SPECIAL REVENUE FUNDS TOTAL

\$25,000

\$0

STATE OF MAINE
DEPARTMENT OF TRANSPORTATION

PRIVATE CROSSING LICENSE

This **License**, made in duplicate this _____ day of _____, 2012, by and between the STATE OF MAINE DEPARTMENT OF TRANSPORTATION (hereinafter called **DEPARTMENT**) JOHN H. DOE AND JANE H. DOE of Windham, Maine (collectively hereinafter called "**LICENSEE**").

WITNESSETH

WHEREAS, **LICENSEE** herein acknowledges that the term **DEPARTMENT**, wherever used in this **License** shall include not only the Maine Department of Transportation, but also any Operator licensed by the Department of Transportation to provide rail service on the Mountain Division, and;

WHEREAS, **LICENSEE** has a requested permission to maintain and use a private crossing for passage in Windham, Maine over the portion of the **DEPARTMENT'S** railroad right of way known to railroad officials as the Mountain Division, at or near Milepost 38.45 as shown on a plan entitled "Right of Way and Track Map, The Portland & Ogdensburg Ry., operated by the Maine Central Railroad Company.", Valuation Section V16, Sheet 1, originally dated June 30, 1915, copy on file with the **DEPARTMENT** and as shown on a plan attached hereto as Exhibit A (the Crossing);

WHEREAS, the **DEPARTMENT** agrees to grant such permission subject to the terms and conditions hereinafter set forth;

NOW, THEREFORE, the parties hereby agree as follows.

1. Grant of License

DEPARTMENT hereby grants to **LICENSEE**, subject to the terms and conditions hereof, permission to maintain and use a private crossing for pedestrian and limited vehicular traffic over the **DEPARTMENT'S** railroad right of way at the Crossing for purposes for which the Benefited Parcel are used as set forth in Section 2 below.

2. Benefited Parcel - Rights Not Transferable

The rights granted by this **License** shall benefit only the parcel of land owned by **LICENSEE**. Such rights are personal to the **LICENSEE** and shall not be assigned or transferred either in whole or in part without the advanced written consent of **DEPARTMENT**. Any attempt to transfer or assign this **License** without such consent shall automatically terminate this **License**, provided that the obligations of the **LICENSEE** under Sections 8, 9 and 11(d) hereof shall survive termination.

3. Annual License Fee

LICENSEE shall pay to **DEPARTMENT** a license fee of Three Hundred Fifty Dollars (\$350.00) per year to cover the cost of inspections and/or maintenance, to be paid annually on or before the anniversary date of this **License**. Payments are non-refundable. Said annual license fee may be adjusted every five years for inflation to reflect the Consumer Price Index (CPI).

4. Term of License

This **License** shall remain in force until suspended or terminated as provided herein.

5. Limitations on Scope

(a) Vehicle Type. Vehicular traffic shall be limited to rubber tired automobiles or trucks. Licensee shall not use, nor allow any other person or persons to use crawler type tractors and vehicles operating on lags.

(b) No Other Rights. Unless expressly stated elsewhere herein, this **License** does not include the right to install utilities within the railroad right of way or any other rights.

6. Construction

(a) Standards. If required by **DEPARTMENT**, the **LICENSEE** agrees to cooperate with the operating railroad the construction of a typical wood plank crossing that complies with all the requirements as determined by the **DEPARTMENT**.

(b) Signage/Gates. If required by **DEPARTMENT**, the **LICENSEE** agrees to install, private crossing and stop signs on each approach of the crossing and provide a locked gate to limit access when crossing is not in use.

7. Maintenance

The **LICENSEE** shall bear all costs and expenses incurred in connection with the maintenance of approaches and all related appurtenances such as signs and gates.

8. Waiver of Claims

LICENSEE hereby waives any and all claims or demands for any injury, including death, or for loss of or damage to property suffered which arise out of, or are in any way related to, this **License** or the use of the Crossing (hereinafter "Claims") that **LICENSEE** now has or that may arise in the future against the **DEPARTMENT** and/or its Railroad Operator as defined in Section 12(a) below.

9. Indemnification

LICENSEE hereby indemnifies and holds harmless the **DEPARTMENT** and/or its Railroad Operator as defined in Section 12(a) below from and against any and all "Claims" by whomever made, and from and against any and all loss, cost, damages, harm or expenses of any kind including reasonable attorney's fees and other dispute resolution costs incurred by **DEPARTMENT**,

excepting only Claims caused solely and directly by negligent acts of the **DEPARTMENT** and/or its Railroad Operator.

10. Insurance

LICENSEE shall, at its sole expense, obtain a general liability insurance policy from an insurance company licensed to do business in Maine by Maine's Bureau of Insurance covering bodily injury and property damage with a policy limit of not less than \$1,000,000. The **DEPARTMENT** shall be named as an additional insured. Such policy shall specifically insure the liabilities herein assumed by the **LICENSEE**. The **LICENSEE** shall pay all premiums and take all other actions necessary to maintain such policy for all times the **LICENSEE** has rights or obligations under this **License**. In the event the said insurance policy is allowed to lapse, this **License** shall automatically terminate without further notice, provided that the obligations of the **LICENSEE** under Sections 8, 9 and 11(d) hereof shall survive termination. Upon request, **LICENSEE** shall furnish **DEPARTMENT** with certificates of insurance demonstrating such insurance is in place.

11. Suspension / Termination

(a) Emergency Suspensions. In case of emergency situations which create a significant risk of bodily injury, the **DEPARTMENT** may suspend use of the Crossing immediately for up to ninety (90) days.

(b) Termination Due to Default by Licensee. In addition to the automatic termination rights provided in Sections 2 and 10 above, if the **LICENSEE** fails to perform any of the other terms and conditions set forth herein, the **DEPARTMENT** may give **LICENSEE** a written notice of default setting forth the basic nature and extent of such default. If **LICENSEE** fails to cure such defaults within thirty (30) days of receipt of said notice of default, then this **License** shall terminate without further notice or action by the **DEPARTMENT**.

(c) Termination Due to Safety / Public Interest. If the **DEPARTMENT** determines that safety considerations or the public interest require termination, then the **DEPARTMENT** may terminate this **License** after giving **LICENSEE** sixty (60) days advance written notice that sets forth the reasons therefore.

(d) Restoration. Upon the termination of this **License** for any reason, the **LICENSEE** shall, at its sole expense: (1) remove the crossing surface, gates, signs, and any other structures from the railroad right of way; (2) fence across the openings with fence of the same style and character as the existing railroad right of way fences in the immediate vicinity; and (3) restore **DEPARTMENT'S** railroad right of way to a condition satisfactory to **DEPARTMENT**, being collectively referred to as "Restoration Work". The obligation of the **LICENSEE** to perform Restoration Work shall survive termination. If the Restoration Work is not performed within thirty (30) days after the date of termination, then the **DEPARTMENT** may perform or cause to be performed the Restoration Work and bill the **LICENSEE** for the cost of such work. **LICENSEE** agrees to pay such bills within 30 days, with interest due upon unpaid balances after 30 days at a rate of 12% per annum.

12. General Provisions

(a) Definitions. The terms "Department" and "Railroad Operator" as used in this **License** include the employees, officers, agents, or other representatives of the **DEPARTMENT** and the Railroad Operator.

(b) Notices. All communications and notices required or permitted under this **License** shall be in writing and shall be deemed sufficiently served if served in hand or by certified mail addressed as follows or such other address as they may designate in writing from time to time:

TO DEPARTMENT: State of Maine Department of Transportation
 Office of Freight Transportation
 16 State House Station
 Augusta, Maine 04333-0016

 Attention: Director, Office of Freight Transportation

TO LICENSEE: John & Jane Doe
 40 Noname Road
 Windham, ME 04062

(c) Entire Agreement / Modification. This **License** contains the entire agreement between the parties with respect to the Crossing and **LICENSEE** has no other rights therein except those hereby granted. This **License** shall not be modified or altered except in writing, signed by both parties.

IN WITNESS WHEREOF, the parties have executed this **License** on the date first written above.

Witness

STATE OF MAINE DEPARTMENT
OF TRANSPORTATION

By _____
Robert D. Elder, Director
Office of Freight Transportation

Witness

LICENSEE

By _____
John H. Doe

Witness

LICENSEE

By _____
Jane H. Doe

1
2 **Be it enacted by the People of the State of Maine as follows:**
3

4 **Sec. 1 23 MRSA §7006-A: Liability on Private Crossings**
5

- 6 1. Definitions. For the purposes of this section, the following terms have the
7 following meanings.
8 A. **Railroad Company** shall have the same meaning as used in 23
9 M.R.S.A. 50001-2
10 B. **Private Crossing.** A Private Crossing shall mean a crossing over a
11 Railroad Company's property that is not a highway or road that is open
12 to public travel or maintained by a public authority.
13 C. **Authorized User.** An Authorized User shall mean a user of a Private
14 Crossing pursuant to a valid and enforceable agreement with the
15 Railroad Company over which the Private Crossing passes, and that
16 user's licensees and invitees.
17 D. **Unauthorized User.** Unauthorized User shall mean a user of a private
18 crossing who is not an Authorized User.
19
20 2. Notwithstanding any other law or any agreement between an Authorized User and
21 a Railroad Company, a Railroad Company does not have a duty of care to any
22 Authorized User for any personal injury, bodily injury, death or property damage
23 arising from or related to such Authorized User's use of a Private Crossing.
24
25 A. This section shall not limit a Railroad Company's liability that would
26 otherwise exist for a willful or malicious failure to guard or warn
27 against a dangerous condition, use, structure or activity.
28
29 3. Any Unauthorized Users of Private Crossings shall be trespassers both at common
30 law and pursuant to 23 M.R.S.A. §7007 and the duty of care of a Railroad
31 Company to such Unauthorized Users shall be the same as to that duty of care, if
32 any, owed to trespassers under Maine law. Private Crossings and other property
33 of a Railroad Company and the fixtures thereon shall not constitute attractive
34 nuisances pursuant to Maine law.
35
36 4. Nothing contained in this Section shall limit the property rights of a Railroad
37 Company and/or grant any rights to utilize the property of a Railroad Company
38 absent a valid and enforceable agreement with the Railroad Company, nor shall
39 this Section adversely affect a Railroad Company's qualification for the sales tax
40 exemption pursuant to 36 M.R.S.A. Section 1760, sub-52, and/or create a taxable
41 event pursuant to that Section.
42
43